

1 it.

2 I mean, you know you're pointing
3 to decision making as being the pivotal point.
4 Well decisions, you know are never made in a
5 vacuum. We all know that. But I'm in a
6 vacuum right now, and it is my vacuum that I
7 have to fill.

8 So, I'm simply saying that it's
9 too early for me to tell.

10 MR. PHILLIPS: I understand.

11 JUDGE SIPPEL: You give me a heads
12 up on it. Maybe we can take those documents
13 in a block at some point and make a ruling on
14 the record on it. And maybe you can't do
15 that, maybe it's got to be document-by-
16 document.

17 MR. PHILLIPS: I understand, Your
18 Honor.

19 JUDGE SIPPEL: And I'll tell you
20 another thing, too. I'm a very curious
21 person. And my curiosity really gets peaked
22 if somebody's trying to keep information out

1 of the record.

2 Now I do understand stale
3 information. I also understand "burdening the
4 record." I understand information which is
5 inflammatory. But, you know business records
6 are not too exciting usually.

7 You know, show me and I'll make a
8 ruling; that's all I can say.

9 MR. PHILLIPS: Well, Your Honor, I
10 wanted to highlight the issue for you.

11 JUDGE SIPPEL: Thank you. Thank
12 you.

13 MR. PHILLIPS: But I'm more than
14 happy to wait until we're further into the
15 case on it.

16 JUDGE SIPPEL: I appreciate it.
17 No, I do.

18 MR. PHILLIPS: We had one other
19 issue --

20 JUDGE SIPPEL: I'm sorry to keep
21 interrupting you. But you might want to also,
22 you can even do it by email and tell me what

1 the documents are. Give me a number on the
2 documents. And if I have nothing to do on the
3 weekend, maybe I can look.

4 No, I'm not trying to be a wise
5 guy on this. No, I'm serious. I'll flip
6 through them and see, and try to pick up what
7 the flavor of this stuff is.

8 MR. PHILLIPS: We'll be happy to
9 do that.

10 JUDGE SIPPEL: Okay.

11 MR. PHILLIPS: One other issue
12 concerns a witness that came up sort of at the
13 last moment in the pretrial proceeding. A Mr.
14 Rigdon, who is a recent hire by Comcast was
15 added to their witness list at the end of
16 February, February 22nd, without a witness
17 statement of any sort.

18 As Your Honor may recall, the
19 depositions in this case were scheduled,
20 ordered to end on March 11th, and in fact did
21 end the week after that.

22 Mr. Rigdon was deposed, but we

1 didn't know what he was being offered for
2 exactly. We knew that he was a new witness
3 and a new employee of Comcast. We inquired on
4 March 9th, two days before his deposition. We
5 were told that he would be testifying not only
6 about his new job, which was the person in
7 charge of distribution decisions at Comcast,
8 but also about his prior job where he had been
9 a person in charge of distribution decisions
10 at a different cable company, Charter, and
11 that he would testify to that.

12 Now this was two days before his
13 deposition and two days before the scheduled
14 end of depositions. As it turned out, we had
15 a couple of depositions following that.

16 Our objection to him is not really
17 that he shouldn't be allowed to testify. It's
18 fine. We have no problem with his testimony
19 on his time at Comcast and anything he wants
20 to say from that because we were able to get
21 documents from Comcast. But with respect to
22 his time at Charter, we really didn't have

1 time and were not given the opportunity to
2 serve a subpoena or to seek documents
3 regarding Charter's decisions. And he wants
4 to testify about what he did and the decisions
5 he made while at Charter.

6 And so we would like to exclude
7 that portion of his testimony which really has
8 to do with the decisions he made at Charter.
9 Because again, Your Honor, we were not told
10 until two days before his deposition and
11 shortly before the end of discovery that he
12 was going to testify regarding any of that.
13 So it's a little bit of a surprise to us that
14 this has now come up and that this is going to
15 be his testimony.

16 I think it's only fair that if we
17 had known that he was going to go into his
18 time and the decision that he has made while
19 at a different cable company, we would have
20 served a subpoena and gotten documents
21 regarding those decisions.

22 Indeed, I might add, that even

1 during the deposition [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 And I'm happy to give Your Honor the cites in
6 the record, if you'd like.

7 So, with respect to Mr. Rigdon, we
8 don't object to his testimony coming in. We
9 would ask the Court to strike those paragraphs
10 of it that have to do with something other
11 then his time at Comcast, instead having to do
12 with his time at Charter.

13 JUDGE SIPPEL: So in paragraph 8
14 in the proposed testimony "Charter's decision
15 to carry Tennis Channel on its sports tier was
16 based on its and mine independent business
17 judgment. It had nothing to do with Comcast's
18 level of carriage." Is that the kind of thing
19 you want out?

20 JUDGE SIPPEL: Yes, Your Honor,
21 it's exactly it. If you look that, and
22 paragraph 1 also refers to all about his time

1 at Charter and decisions he made at Charter
2 and the broad carriage -- this is something we
3 were not able to get documents on just because
4 it was at the last moment.

5 JUDGE SIPPEL: Did you contact
6 Charter at all?

7 MR. PHILLIPS: No, Your Honor, we
8 didn't contact Charter at all. We would have
9 subpoenaed them had this come up earlier in
10 the process. We would have subpoenaed
11 different documents. But as it was, as I
12 said, we didn't learn until March 9th, two
13 days before his deposition, after we inquired
14 that he intended to give any testimony based
15 on his experience at Charter.

16 JUDGE SIPPEL: And do you know if
17 he personally has any documents to back these
18 assertions up?

19 MR. PHILLIPS: No, Your Honor, I
20 don't know. I assume that if he'd had any
21 documents that were public documents that he
22 could share, he would have produced them.

1 As I say, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 JUDGE SIPPEL: Say that part
6 again; who has objected to this?

7 MR. PHILLIPS: [REDACTED]

8 JUDGE SIPPEL: Okay.

9 MR. PHILLIPS: [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 As Your Honor may know, Charter
13 went into --

14 JUDGE SIPPEL: All right. I mean,
15 I'll ask Mr. Carroll, but what was your
16 understanding, [REDACTED]

17 MR. PHILLIPS: Well, I think it
18 was a [REDACTED] Your
19 Honor.

20 JUDGE SIPPEL: But nobody's
21 contacted Charter?

22 MR. PHILLIPS: [REDACTED]

1 because Charter went into bankruptcy, Your
2 Honor.

3 JUDGE SIPPEL: Oh. I wasn't aware
4 of that.

5 MR. PHILLIPS: And so part of our
6 view was that the reasons that Charter made
7 the decisions about carrying the Tennis
8 Channel in the sports tier as opposed to being
9 more broadly distributed, and therefore paying
10 more fees for it, may have had to do with its
11 bankruptcy, may have had to do with its
12 financial condition. Lots of reasons that it
13 may have gone into that which would be
14 completely distinct from the decisions that
15 Comcast made. And we thought that it was fair
16 for us to explore those.

17 Again, we weren't given enough
18 time with two days to get a subpoena out for
19 them. [REDACTED]

20 [REDACTED]

21 JUDGE SIPPEL: That's a good
22 point.

1 Mr. Carroll?

2 MR. CARROLL: Your Honor, I
3 actually disagree. I don't think that's an
4 accurate rendition of what happened.

5 First by way of background, Mr.
6 Rigdon replaced Mr. Bond in February of this
7 year and is now the person who is in charge of
8 content acquisition. He's the guy who makes
9 the decisions now at Comcast with respect to
10 what programs are carried on cable and at what
11 distribution level.

12 So in fairness because Your Honor
13 is being asked to issue orders now that might
14 have a go-forward impact and because we'd had
15 the personnel change, we identified Mr.
16 Rigdon within a week or two when that happened
17 and we served him up for a deposition, and I
18 did give him notice as to what he would have
19 to testify to in advance of the deposition.
20 And then I gave him extra discovery afterward
21 so that there would be no prejudice to them,
22 and responded to document requests they served

1 on us for any documents he had. And so that's
2 the first thing about Rigdon, and that's the
3 reason for the timing of it.

4 The deposition went forward.
5 There was no protest by them at the time that
6 these matters shouldn't be in the case; we're
7 not even going to take his deposition, we
8 can't do it. There was no effort to come to
9 Your Honor for any relief back then. There
10 was no effort to do anything. And there was
11 no complaint about the scope of my document
12 production or anything.

13 On the eve of this trial we now
14 find out for the first time that they want to
15 preclude the testimony, and there's a reason
16 I think that has more to do with the testimony
17 than anything else, so let me get to that.

18 JUDGE SIPPEL: Yes, please do.
19 But you say "on the eve of," when did it come
20 up? What we're talking about now, when did it
21 come up

22 MR. CARROLL: I learned this

1 yesterday.

2 MR. PHILLIPS: Your Honor, on
3 March 9th, I have the email here, I'm very
4 happy to hand it up, this is when we were told
5 for the very first time; on March 9th. And
6 under your order, Your Honor, March 11th
7 discovery ends. Mr. Rigdon's deposition is on
8 March 11th.

9 JUDGE SIPPEL: I want to be
10 careful on that. These are the dates that
11 counsel submitted to me.

12 MR. PHILLIPS: No, I understand
13 that, Your Honor.

14 JUDGE SIPPEL: I didn't make these
15 dates up.

16 MR. PHILLIPS: I understand, Your
17 Honor.

18 JUDGE SIPPEL: Okay. I just want
19 to make sure that that's clear, that's all.
20 I'm not arguing with you.

21 MR. PHILLIPS: On March 9th we
22 have an email that says, and in response to

1 our request they identified that Mr. Rigdon
2 replaced Mr. Bond. You remember Mr. Bond from
3 the last time, Your Honor.

4 JUDGE SIPPEL: Yes, sir.

5 MR. PHILLIPS: [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] That's what
17 they said to put us on notice that he was
18 going to be testifying about his experience at
19 Charter two days before the deposition and two
20 days before the stipulated end of discovery.

21 Now at the deposition, Your Honor,
22 when my colleague Ms. Pogoriler [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 Now with all due respect, Your
10 Honor, I understand and certainly given more
11 time, we would have gone to Charter with a
12 subpoena. The document production in this
13 case ended in the end of January, Your Honor.
14 And we certainly didn't want to blow this
15 schedule for this.

16 My point is merely that they've
17 added a witness. He has one month experience
18 at Comcast, he can testify that experience at
19 Comcast. But for him to testify -- and their
20 main purpose here, Your Honor, is to try to
21 slip in all the information he had about
22 making decisions when he was at Charter when

1 we really haven't gotten any discovery on that
2 issue. Comcast doesn't have it. And we have
3 gotten the documents about those decisions.
4 And we weren't allowed to go forward with it.

5 JUDGE SIPPEL: Well, let me
6 clarify one thing first in my mind, anyway.
7 This man is now an employee of Comcast, but
8 hypothetically if he were not an employee of
9 Comcast but he had this information, he had
10 this information about when he worked for
11 Charter, it was a another cable company,
12 correct?

13 MR. PHILLIPS: Yes.

14 JUDGE SIPPEL: And that they had
15 made certain decisions about what level to put
16 the Tennis Channel on, which is that correct?

17 MR. PHILLIPS: Yes, Your Honor.

18 JUDGE SIPPEL: Well, I'm just
19 trying to set the stage here. His testimony
20 would be sought if there was something that
21 would be helpful to your arguments about how
22 decisions are made to put people on different

1 levels, correct?

2 MR. PHILLIPS: Yes, Your Honor.

3 JUDGE SIPPEL: Correct?

4 MR. PHILLIPS: Yes, Your Honor.

5 JUDGE SIPPEL: And I'm sure that
6 Mr. Carroll would be objecting to it on the
7 same basis he's objecting right now, so --

8 MR. PHILLIPS: But in that
9 instance if we had known just like with any
10 witness, if we had known that they were going
11 to put on a witness from a different cable
12 company to talk about their experience with
13 the Tennis Channel, we would have subpoenaed
14 that cable company and gotten documents from
15 them regarding those decisions. So that the
16 witness couldn't sort of testify carte blanche
17 as to the decisions. There would be a record
18 on paper of the decisions with which to cross-
19 examine.

20 JUDGE SIPPEL: Well, I understand
21 what you're saying. I understand. I just
22 don't understand why -- I mean, there is a

1 remedy of asking for an extraordinary relief
2 or relief from the deadline on the schedule
3 because of unforeseen circumstances that are
4 very important to your case. I mean, I'm not
5 trying to make the argument. I'm simply
6 saying that that argument can be made, and I'd
7 certainly have to look at the paper.

8 MR. PHILLIPS: Yes.

9 MR. CARROLL: And, Your Honor--

10 JUDGE SIPPEL: And he object,
11 probably.

12 MR. CARROLL: Actually, no, they
13 go the relief, Your Honor, because look what's
14 happening in the case.

15 JUDGE SIPPEL: Well, wait a
16 minute. He said that he wants documents which
17 are non-public.

18 MR. CARROLL: No, I know. I know.
19 I'm responding to that point, Your Honor.

20 JUDGE SIPPEL: Okay.

21 MR. CARROLL: Because I haven't
22 finished the second part of my argument.

1 JUDGE SIPPEL: Okay. All right.

2 I'm sorry. Go ahead.

3 MR. CARROLL: And Mr. Phillips has
4 gone twice now.

5 JUDGE SIPPEL: Yes, sir.

6 MR. CARROLL: I'm still trying to
7 respond to the first go around.

8 I've explained who Mr. Rigdon is
9 and how he comes to be before Your Honor, and
10 how he's central now to the content issue.

11 Now obviously, a key part of his
12 background is the job he just held. And in
13 the job he just held he was the guy, among
14 other things, who was responsible for the
15 negotiations with Tennis Channel over what
16 carriage Tennis Channel would get at another
17 cable company. Terribly relevant to this case
18 because one of the key elements of
19 discrimination as the FCC, and I think Your
20 Honor, has recognized in other cases is what
21 are the other cable companies doing.

22 Here's one of them, Charter.

1 Here's the guy who used to do it at Charter.

2 We put them on notice: The email
3 that Mr. Phillips read to you discloses the
4 fact that he's going to talk about his prior
5 work at Comcast as it relates to Tennis
6 Channel. [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] And you can look at the deposition
12 transcript. [REDACTED]

13 [REDACTED]

14 And, in fact, here's the irony,
15 Your Honor, they own Tennis Channel. [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED] I'm the guy who doesn't have them.

20 The only proposition I'm putting
21 him in for, and this would be relevant you'll
22 see, one of their experts, Mr. Singer, is

1 going to say among other things "Oh, ignore
2 other cable companies who aren't carrying
3 Tennis Channel because a lot of them just
4 follow Comcast and they're really not making
5 their own decisions." Here's the guy who is
6 now our guy who was Charter's guy who can tell
7 you firsthand as the witness in the box
8 subject to their cross-examination "Here's
9 what I did with Tennis Channel there, and
10 that's why I come to Comcast I know about this
11 issue already, and I have a very defined view
12 about it."

13 Lastly, in terms of discovery,
14 just so Your Honor understands. The deadlines
15 were cooperatively extended to permit
16 additional discovery. Now I've not complained
17 about this, and I'm not complaining now except
18 to put a point back on Mr. Phillips.

19 They have continued to produce
20 documents to me relating to their key witness
21 who has been here for over a year as late as
22 the week before last. I got a dump of 12,000

1 documents for one of their witnesses, Mr.
2 Solomon, who has been their witness for the
3 longest time. I didn't complain, I took the
4 documents, we moved forward. You know, it is
5 what it is.

6 They've had two months they could
7 have been pursuing more documents of Charter
8 if they needed to. They did pursue more
9 documents from us after the deposition, we
10 gave them all to them. [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED] Even though it just
14 happened, we gave them all the documents.

15 And last thing, they could have
16 said at the time of the deposition "We
17 protest. We're going to go to the Judge. He
18 shouldn't come in." They could have said
19 "Even though we have the documents from the
20 Charter side ourselves, we think there's
21 something unfair." They could have gone and
22 called up Charter, as Your Honor suggested,

1 and sought the relief to get the documents,
2 although again they have them. They were on
3 the other side of the negotiations.

4 They didn't do any of that. And
5 now to show up and say and say we would want
6 to deprive Your Honor of this very relevant
7 evidence that goes to discrimination and
8 whether my client is discriminating or whether
9 instead there's a market out there and we have
10 a witness who can tell you firsthand, not an
11 expert speculating but firsthand what that
12 market was like, I think would be unfair and
13 it would lead to an incomplete record.

14 So I think, in summary, you're
15 gotten a very one-sided description of the
16 exchange of evidence of discovery which is not
17 fair. Both sides have continued to produce
18 documents. They have had ample opportunity to
19 pursue this issue. They don't like the
20 substance of the testimony, and that's really
21 the problem they have because it goes right to
22 one of the core issues.

1 And we have bent over backwards to
2 explain about Mr. Rigdon as soon as he was
3 hired, to make him available, and to continue
4 to produce documents after that so that they'd
5 have anything they needed.

6 JUDGE SIPPEL: How long was he
7 deposed?

8 MR. PHILLIPS: He was deposed [REDACTED]
9 [REDACTED] Your Honor.

10 JUDGE SIPPEL: There was one day?

11 MR. PHILLIPS: [REDACTED]
12 [REDACTED] [REDACTED]

13 Again, we didn't [REDACTED]
14 [REDACTED]
15 [REDACTED] you know less than
16 two days before the deposition took place.

17 JUDGE SIPPEL: Well, wait a
18 minute. What about Mr. Carroll's point? I
19 mean, Tennis Channel was the ones that
20 negotiated all the things with Charter at that
21 time. I mean, I guess they know, they should
22 know Mr. Rigdon fairly well.

1 MR. PHILLIPS: We didn't have the
2 internal documents from Charter, Your Honor.

3 JUDGE SIPPEL: Well, no, you
4 wouldn't have those, but you'd have your own,
5 the Tennis Channel's.

6 MR. PHILLIPS: We have that. We
7 have the contract and the cost line that's
8 there, yes, Your Honor. But what we didn't
9 have, what we didn't have were the internal
10 cost line that's the internal emails and like,
11 which always are very revealing about why
12 decisions are made.

13 Now it's not a fact in dispute
14 here about how Charter carries Tennis Channel.
15 That's not a fact. And that's a fact that
16 both witnesses take into account. We don't
17 think it's as relevant as they do. Our view
18 is what's relevant here is the different
19 treatment between Comcast on affiliated
20 channels and the Tennis Channel. But both
21 sides have -- there's been no disputed fact
22 about the carriage decisions made by other

1 MSOs, and other MVPDs which carry Tennis
2 Channel much more broadly than Comcast.

3 All that being said, our complaint
4 is very limited, which is that on March 9th,
5 less than 48 hours before this deposition and
6 two days before the stipulated end of
7 discovery we're told obliquely that this other
8 material is going to come in.

9 We actually didn't know, Your
10 Honor, how much of his testimony was going to
11 center on his Charter experience as opposed to
12 his Comcast experience until I got his witness
13 statement last Friday.

14 JUDGE SIPPEL: And then coming
15 into the deposition you didn't get a feel for
16 what was going on here?

17 MR. PHILLIPS: I didn't get a feel
18 for that's the reason he was being offered.
19 I knew he had that experience. I frankly
20 thought he was being offered to testify about
21 decisions being made right now with respect to
22 Comcast. He made a very grand statement in